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MEMORANDUM

To: Council, City of Takoma Park

Via: Richard M. Finn, City Manager

From: Linda S. Perlman, Assistant City Attorney

Subject: Stormwater Management - Drainage Problems on Private Property

Date: December 4, 2003

The Council has had several recent discussions on stormwater management; specifically, on whether or not the City should continue to be responsible for stormwater management and whether the City should act to address stormwater drainage problems on private property.

1. Transfer of stormwater management responsibility to Montgomery County.

This is not a matter of the City of Takoma Park having "opted out" of the County's stormwater management law. Montgomery County never had stormwater management authority in the City. Before the City took over stormwater management authority, the Washington Suburban Sanitary Commission (WSSC) had responsibility for stormwater management in the City. WSSC got out of the stormwater business and transferred its stormwater management responsibilities and facilities to Montgomery and Prince George's Counties as of July 1, 1987, and to the City of Takoma Park as of July 1, 1990. This was done by state law--*Md. Ann. Code* article 29, sections 3-202 *et seq.* This state law prohibits Montgomery County from exercising any authority as to stormwater management within the City "unless the City and the County otherwise agree." State law also allows Montgomery County to establish a stormwater management district, but states that the County's stormwater management district may not include any land within the City.

In other words, the City cannot simply stop providing stormwater management services and have Montgomery County take over responsibility for stormwater management. Such a transfer of stormwater management functions from the City to Montgomery County would require a state law

change or, alternatively, a contract between the City and Montgomery County for Montgomery County to provide stormwater management functions in the City. The terms and provisions of any such contract would need to be negotiated to determine if such an arrangement would meet the City's stormwater management needs.

2. Storm Drainage on Private Property.

a. Maryland rule.

The civil law rule applies in Maryland; that is, the owner of higher land is entitled to have surface water flow naturally from his land onto the lower land of an adjoining landowner. However, the higher landowner cannot, with impunity, artificially increase or concentrate the natural flow of such waters, whether the lands are urban or rural.

b. Montgomery County enforcement of stormwater drainage problems between private property landowners.

A representative of the Montgomery County Department of Housing and Community Affairs will be present to answer Council questions regarding the County's efforts to address stormwater drainage disputes between private property owners. It is our understanding that Montgomery County has attempted to address such problems as "public nuisances" under Chapter 26, Building and Property Maintenance Standards, of the *Montgomery County Code*.¹ The pertinent part of the definition of "public nuisance," in Sec. 26-2, reads as follows:

Public nuisance. Any dwelling, dwelling unit, or nonresidential structure, or any part of any of them, that is: . . . (e) creating a condition that would or could result in substantial damage to another property; . . .

Effective August 15, 2003, the City adopted Chapter 26 of the *Montgomery County Code* as the City's property maintenance code which means that the City now has the same private nuisance provision as the County does. However, the "public nuisance" definition in Sec. 26-2 seems to be a weak statutory basis to cite a landowner for creating a stormwater drainage problem that is adversely affecting another private property landowner (it isn't a condition related to a dwelling and doesn't really seem to apply). If the City decides to initiate code enforcement efforts relating to stormwater/drainage problems on private property, then I would recommend that the Council adopt a Code provision which is more on point.

c. Private property stormwater enforcement by the City.

There are many difficulties, including cost, in having the City take on the responsibility of solving private property stormwater drainage problems. Simply because surface waters flow onto an adjoining property or cause flooding or drainage problems to the adjoining property does not

¹ There is nothing in Montgomery County's stormwater management chapter that deals with stormwater drainage problems between private property landowners.

mean that the “higher” landowner must contain the surface water solely on his own property or is responsible for damages to the “lower” landowner. Generally, there will only be liability—and a duty to remedy the problem—on the “upper” landowner if that landowner is discharging or diverting surface water into an artificial channel or in a different manner than the usual and ordinary course of drainage and has thereby caused damage to an adjoining or lower landowner’s property.

The cause of and solution to some private property stormwater problems may be obvious and straightforward. However, in most cases, I would expect that a complaint will only be made to the City after the landowner has attempted to resolve the drainage problem with the adjoining landowner and has been unable to reach a satisfactory agreement—whether because of a dispute over the cause or responsibility for the problem or the cost of the necessary corrective action.² In most situations, particularly the difficult ones, in order for the City to evaluate and act on drainage and flooding problems on private property, the first step will need to be a study of the drainage and flooding problem on private property and its cause by an engineer.³ This would include (1) an assessment of which neighboring properties contribute to the flooding or drainage problem on the property; and (2) a determination of the corrective action which needs to be taken (and what properties the corrective action involves). Only after (1) is completed will the City even know whether or not there is a violation and who to serve a violation notice on (and later, a citation) and (2) is required in order to get the neighboring landowner to correct the condition or, if the neighbor(s) will not do so voluntarily, to include in an Abatement Order which the City would ask the Judge to enter at the time the citation is adjudicated. I also anticipate that expert testimony (*i.e.*, by the engineer) would be required to prove such a case in court.

We have been asked by the City Manager to provide an estimate of the legal costs to prosecute a municipal infraction case, including seeking a court order of abatement (*i.e.*, injunctive relief) and any necessary enforcement proceedings, against a violator in a private property stormwater drainage situation. There are many unknown variables in giving such an estimate; however, we would estimate the legal costs at a minimum of \$1,000.00 per case. There also would be expert witness costs, whether this is an outside engineer (estimated at an additional \$1,000.00 per case) or the time of a City employee. It also should be noted that there is rolling terrain throughout the City and numerous steep slopes which create stormwater problems for “lower” properties. The demand for private property stormwater problem solving—and consequent legal action and expense—is potentially great.

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² It also should be noted that City involvement in private property stormwater disputes will involve the City advocating on behalf of, and perhaps prosecuting, one City property owner against one or more other City property owners for drainage problems that involve private interests.

³ One possibility to defray some of the City’s expense is to charge the property owner for this engineering work.